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| 10/830,001 | 04/23/2004 | Michaela Kohut | P25129 | 7651 |

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| EXAMINER | |
|---|---|
| BROOKS, KRISTIE LATRICE | |

| ART UNIT | PAPER NUMBER |
|---|---|
| 1616 | |

| NOTIFICATION DATE | DELIVERY MODE |
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| 06/25/2009 | ELECTRONIC |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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| Office Action Summary | Application No. | Applicant(s) | |
|---|---|---|---|
| | 10/830,001 | KOHUT ET AL. | |
| | Examiner | Art Unit | |
| | KRISTIE L. BROOKS | 1616 | |

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☒ Responsive to communication(s) filed on *27 October 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☒ Claim(s) *1-37 and 40-47* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-37 and 40-47* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

## DETAILED ACTION

### *Status of Application*

1. Claims 1-37 and 41-48 are pending.

2. Receipt and consideration of Applicants remarks/arguments submitted on October 27, 2008 is acknowledged.

3. Rejections not reiterated from the previous Office Action are hereby withdrawn. The following rejections are either reiterated or newly applied. They constitute the complete set of rejections presently being applied to the instant application.

### *Claim Rejections - 35 USC § 103*

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

5. Claims 1-25, 28-34, 36-37 and 40-44 and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Giret et al. (US 5,776,872).

Applicant claims a cosmetic or dermatological cleansing emulsion comprising: (a) from about 2 % to about 17 % by weight of at least one of sodium laureth sulfate and sodium myreth sulfate; (b) from about 0.20 % to about 0.74 % by weight of one or more polyacrylates selected from anionic homopolymers and anionic copolymers of at least one of acrylic acid, an alkylated acrylic acid and esters thereof; (c) from about 42 % to about 51% by weight an oil phase comprising (i) from about 25 % to about 50 % by weight of a paraffin oil, (ii) from about 0.5 % to about 25 % by weight one or more oils having a polarity of from about 5 to about 50 mN/m;

**Determination of the scope and content of the prior art**

**(MPEP 2141.01)**

Giret et al. teach a cleansing emulsion comprising (a) from about 5% to 50% of a mixed surfactant system which comprises (i) from about 1% to about 20% by weight of an anionic surfactant, such as, alkyl sulfates (i.e. sodium laureth sulfate, sodium myreth sulfate, etc.) and (ii) from about 1 to 20% of an amphoteric surfactant system, (b) from about 3% to about 40% of an oil phase containing hydrocarbons such as mineral oils and petroleum, and triglycerides, such as, almond oil, and soybean oil and (c) water, wherein the weight ratio of the surfactant:oil is in the range of 10:1 to about 1:3 (see the abstract, column 2 lines 48-67, column 3 lines 11-31, and column 5 lines 21-57). The composition also contains 0.01 to about 5% of anionic polymers such as cross-linked

polymers of acrylic acid (see column 10 lines 18-27). The viscosity of the emulsion is preferably at least 1000cps (~1000mPas) (see column 10 lines 28-45).

**Ascertainment of the difference between the prior art and the claims (MPEP 2141.02)**

Giret et al. teach an emulsion composition that can from 3% to about 40% of an oil phase, wherein the oil phase comprises paraffin oils and one or more oils of a polarity of about 5-50mNm, but do not teach the instantly claimed amount of paraffin oil and one or more oils of a polarity of about 5-50mNm in the oil phase.

**Finding of prima facie obviousness**

**Rational and Motivation (MPEP 2142-2143)**

One of ordinary skill in the art would have been motivated to make a cosmetic or dermatological cleansing emulsion comprising from about 42 % to about 51% by weight of an oil phase that contains (i) from about 25 % to about 50 % by weight of a paraffin oil, and (ii) from about 0.5 % to about 25 % by weight of one or more oils having a polarity of from about 5 to about 50 mN/m because Giret et al. suggests the oil phase in an amount of up to about 40% by weight of the final composition, wherein the oil phase contains paraffin oils and one or more oils having a polarity of from about 5 to about 50 mN/m (i.e. soybean oil, almond oil, etc).

Thus, it would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to make a cosmetic or dermatological cleansing emulsion

comprising from about 42 % to about 51% by weight of an oil phase that contains (i) from about 25 % to about 50 % by weight of a paraffin oil, and (ii) from about 0.5 % to about 25 % by weight of one or more oils having a polarity of from about 5 to about 50 mN/m due to process optimization, in which one of ordinary skill in the art would vary the amount of oil that is necessary to achieve the optimum cleansing foam.

It is noted that Giret et al. teach about 40% of an oil phase whereas Applicant claims "about 42%". However, Applicant uses "about" language in the instant claim. Applicant has not defined what amounts are encompassed by the term "about" and thus it is the Examiners position that the amount taught by Giret et al. meets the instant limitation of "about 42%".

Therefore, the claimed invention would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made because the prior art is fairly suggestive of the instant composition.

6. Claim 45 is rejected under 35 U.S.C. 103(a) as being unpatentable over Giret et al. (US 5,776,872).

Applicant claims a method of cleansing the skin comprising the application of the product of claim 1 onto the skin.

**Determination of the scope and content of the prior art**

**(MPEP 2141.01)**

Giret et al. teach a cleansing emulsion that are useful for cleansing the skin and or hair and may be used as a foam bath and shower products comprising (a) from about 5% to 50% of a mixed surfactant system which comprises (i) from about 1% to about 20% by weight of an anionic surfactant, such as, alkyl sulfates (i.e. sodium laureth sulfate, sodium myreth sulfate, etc.) and (ii) from about 1 to 20% of an amphoteric surfactant system, (b) from about 3% to about 40% of an oil phase containing hydrocarbons such as mineral oils and petroleum, and triglycerides, such as, almond oil, and soybean oil and (c) water, wherein the weight ratio of the surfactant:oil is in the range of 10:1 to about 1:3 (see the abstract, column 2 lines 48-67, column 3 lines 11-31, and column 5 lines 21-57). The composition also contains 0.01 to about 5% of anionic polymers such as cross-linked polymers of acrylic acid (see column 10 lines 18-27). The viscosity of the emulsion is preferably at least 1000cps (~1000mPas) (see column 10 lines 28-45).

**Ascertainment of the difference between the prior art and the claims (MPEP 2141.02)**

Giret et al. teach the cleansing emulsions are useful for cleansing the skin and/or hair but do not exemplify application to the skin.

**Finding of prima facie obviousness**

**Rational and Motivation (MPEP 2142-2143)**

One of ordinary skill in the art would have been motivated to apply a cleansing emulsion comprising a mixed surfactant system which comprises (i) an anionic surfactant, such as, alkyl sulfates (i.e. sodium lauryl sulfate, sodium myreth sulfate, etc.) and (ii) an amphoteric surfactant system, an oil phase containing hydrocarbons such as mineral oils and petroleum, and triglycerides, such as, almond oil, and soybean oil , water and polyacrylates to the skin because Giret et al. teach the instant components in a cleansing emulsion that is useful for cleansing the skin.

Thus, it would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to apply the instant emulsion to the skin for the purpose of cleaning the skin or hair.

It is noted that Giret et al. teach about 40% of an oil phase whereas Applicant claims “about 42%”. However, Applicant uses “about” language in the instant claim. Applicant has not defined what amounts are encompassed by the term "about" and thus it is the Examiners position that the amount taught by Giret et al. meets the instant limitation of "about 42%".

Therefore, the claimed invention would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made because the prior art is fairly suggestive of the instant composition.

***Response to Arguments***

Applicant's arguments filed October 27, 2008 have been fully considered but they are not persuasive.

Applicant argues that Giret et al. expressly teaches that the personal cleansing product contains not more than 40% by weight of an insoluble nonionic oil or wax.

This argument is not convincing. As stated above in the 103 rejection, Giret et al. teach the oil or wax being present in an amount of about 40% by weight. Thus, it is capable of having amounts greater than 40% by weight.

Next, Applicant argues that Giret et al. teaches a much higher viscosity (i.e. from 10,000 to 40,000 cps) than presently claimed.

This argument is not persuasive. As stated above in the 103 rejection, Giret et al. discloses the viscosity of the composition is preferably at least 1000cps (see column 10 lines 28-31). Although it is preferred by Giret t have a viscosity greater than 10,000cps, disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971).

Applicant argues that Giret et al. do not teach or suggest an oil phase comprising both a paraffin oil and one or more oils having a polarity of about 5 to 50mN/m in certain concentrations.

This argument is not convincing. Although Giret et al. do not specify the amount of each individual oil, it is well known that paraffin oils (i.e. mineral oil) have a polarity of around 35mN/m (as evidenced by The Merck Index, see 892 form). Thus, the paraffin oil can also be the polar oil and the concentration would thus, fall within the amount that is instantly claimed.

Therefore, Applicant's arguments of nonobviousness are not persuasive and the rejection is maintained.

***Conclusion***

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KRISTIE L. BROOKS whose telephone number is (571)272-9072. The examiner can normally be reached on M-F 8:30am-6:00pm Est..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann R. Richter can be reached on (571) 272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

KB

/Johann R. Richter/

Supervisory Patent Examiner, Art Unit 1616